IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 795 - 796

IRVING FAINBLATT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

—o—

LEON FAINBLATT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that writs of certiorari be issued to the Court of Appeals for the Second Circuit to review the judgments of that Court.

Statement of Matter Involved.

This is a petition for writs of certiorari to review a decision of the Court of Appeals for the Second Circuit, which affirmed a decision of the Tax Court of the United States deciding that there are deficiencies in the petitioners' respective income taxes for the cal-

endar years 1941 and 1943. The deficiencies result from the Commissioner's determination that each of the petitioners must include in his gross income for the calendar years 1941, 1942, and 1943, one-third of the net income of Lee Sportswear Co., a partnership, for the fiscal years ending within such calendar years. The petitioners have contended in the courts below that each of them properly reported only one-sixth of the partnership income for these years, and that the remaining one-sixths were properly reported by their respective wives.

The petitioners rely solely on the facts found by the Tax Court (R. 6-11). The petitioners are brothers. Since 1929 they and their sister Margaret Horowitz have been equal partners in Lee Sportswear Co., engaged in the manufacture and sale of women's and children's sport clothing and women's work clothing. All three have devoted their full time to the business. In 1931 one Harry Horowitz was employed as the designer and production manager. Horowitz had been in the needle trade industry since 1911, had been in business for himself, was thoroughly experienced, and was from the start a valuable asset to the business. In 1934 he married Margaret Horowitz. At that time the partners offered him a partnership interest, but he refused because he felt it might later create family friction; he continued to work as an employee. However, a few years later he began to feel differently, and he discussed the matter with his wife. She took up the problem with her brothers, but no decision was reached. In 1940 Horowitz finally demanded a partnership interest, letting the others know that he had received such offers from other manufacturers. All of the parties wanted to retain his services, and lengthy discussions were held over several months. The father of the petitioners was the arbitrator of all family disputes, and he participated in these discussions. There was some discussion of Horowitz becoming a one-fourth partner, but he said he would be satisfied with a one-sixth interest coming out of Mar-

garet's share. Margaret, however, felt that by transferring to him half of her interest she would not have an equal voice with her brothers in the management of the company. She then suggested the solution: that she transfer half of her interest to her husband, and that her brothers transfer half of their interests to their respective wives, with powers of management to be retained by her brothers and herself.

In its findings of fact the Tax Court states, "The formation of the partnership was prompted and organized solely by the insistence of Horowitz that he should have a position in the company comparable with those offered to him by other manufacturers" (R. 8). In its opinion the court states, "The transaction before us bears none of the earmarks of an attempt to evade the tax responsibility of the Fainblatt brothers and their sister" (R. 12). Nevertheless, despite the fact that "their entrance into the firm grew out of the emergent necessity of including Harry Horowitz therein", the petitioners' wives were held "not recognized as partners for Federal income tax purposes" (R. 13). The reason was that "they contributed no capital to the business and performed no appreciable services for it", and that "their inclusion in the partnership did not alter the economic status of their husbands as joint producers of the income" (R. 12).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code. Judgments were entered herein by the Court of Appeals on February 15, 1949 (R.). No petitions for rehearing were filed.

Opinions Below.

The memorandum opinion of the Tax Court, printed in full in the record (R. 4-13), is not officially reported, but appears in C. C. H. Dec. 15,843 and P-H ¶47,153. The Court of Appeals affirmed in open court (172 F. 2d 389; R.).

Specification of Error to Be Urged.

The Court of Appeals erred in affirming the decisions of the Tax Court which were based upon the erroneous rule of law that the validity of a partnership is determined solely by the nature of the capital or services contributed by a partner.

Reasons for Granting the Writs.

1. The rule of law announced by the Tax Court, and sustained by the Court of Appeals, is in conflict with the principles announced by this Court in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293.

2. The decision of the Tax Court, affirmed by the Court of Appeals, is in direct conflict with decisions of other Courts of Appeals, including a decision of the Court of Appeals for the Fifth Circuit in which this Court has granted certiorari. *Culbertson* v. *Commissioner,* 168 F. 2d 979, cert. granted 335 U. S. 883.

3. The question decided by the courts below has been frequently litigated and is an important question of federal law which has not been, but should be, settled by this Court.

4. The rule of law adopted by the courts below, to the effect that an ultimate fact (*i. e.,* the validity or "reality" of a partnership) may be found on the basis of any single fact (*i. e.,* the nature of the capital or services contributed by a partner), to the exclusion of all other relevant facts, is so great a departure from the accepted course of judicial proceedings, that a review by this Court is required.

The *Culbertson* case was argued before this Court on February 7, 1949, but has not yet been decided. If the Court affirms that decision, or if it accepts the legal theory advanced in the brief of *amicus curiae,* then the pres-

ent case must be reversed. Basically, the Tax Court committed the same error in the *Culbertson* case as it did here. In that case, however, the ultimate fact of "reality" could only be inferred from the record or read between the lines of the Tax Court's findings of fact. Perhaps in that case the Court of Appeals should not have made its own determination as to that ultimate fact, but should merely have remanded for a determination under correct legal principles. In the present case, however, the Tax Court's own findings could scarcely be more explicit on the question of the *bona fides* and "business purpose" of the partnership. If the court had felt free to decide the case on the basis of over-all "reality", there could be no doubt but that the decision would have been for the petitioners. The actual decision can be explained only by the narrow "capital and services" interpretation of the *Tower* case to which the Tax Court has restricted itself. The present case truly represents the *reductio ad absurdum* of that interpretation. If this Court announces that the *Tower* opinion was not meant to be so narrowly construed, then this case should be decided for the petitioners on the findings as made.

Because the decision in this case is in conflict with principles announced by this Court and by other Courts of Appeal, and because these principles are of great importance in the administration of the federal tax laws, it is respectfully requested that certiorari be granted.

Respectfully submitted,

MARK H. JOHNSON,
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Of Counsel:

JACOB RABKIN.

May 16, 1949.